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No. 06-567

IN THE SUPREME COURT OF THE UNITED STATES

PAUL JUNG, M.D., *ET AL.*,

Petitioners,

v.

ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners' complaint alleged that the National Resident Matching Program (the "Match") was the centerpiece of a single "highly intertwined" conspiracy that violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Congress responded to the suit by enacting Section 207 of the Pension Funding Equity Act of 2004, 15 U.S.C. § 37b ("Section 207"), which expressly provides that an antitrust claim may not be based on Match-related conduct. Relying on Section 207, the district court dismissed the complaint, and the court of appeals affirmed *per curiam* in a not-for-publication order.

The Petition presents the following questions:

1. Did the lower courts correctly conclude that, in light of Section 207, petitioners' complaint should be dismissed because their claim was based on Match-related conduct?

2. Did the lower courts correctly conclude that Section 207 does not violate the constitutional doctrine of separation of powers?

3. Did the district court abuse its discretion in concluding that dismissal of petitioners' complaint should be with prejudice?

4. Was petitioners' post-judgment motion under Fed. R. Civ. P. 59(e) time-barred because, after expiration of the ten-day jurisdictional period, petitioners abandoned the original basis for their motion and substituted a different theory for post-judgment relief; and, if not, did the district court abuse its discretion in denying the motion on its merits?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners correctly identify the defendants below. The corporate disclosure statements required under Rule 29.6 appear in the accompanying appendix.

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STATUTES INVOLVED

The Petition quotes only excerpts from Section 207 of the Pension Funding Equity Act of 2004, 15 U.S.C. § 37b. *See* Pet. 2. The full text of Section 207, including omitted portions that bear directly on the issues presented, is set forth at Pet. App. 159-63.

STATEMENT OF THE CASE

1. For more than 50 years, medical students and teaching hospitals have used a computerized matching system to align the respective preferences of graduating medical students and graduate medical residency programs to which the students apply. Commonly known as "the Match," the system is operated by the National Resident Matching Program, a non-profit entity whose board of directors includes representatives of medical student organizations as well as associations of medical schools and teaching hospitals. Pet. App. 160. Congress described the operation of the Match as follows:

> "The Match uses a computerized mathematical algorithm, as students had recommended, to analyze the preferences of students and residency programs and match students with their highest preferences from among the available positions in residency programs that listed them. Students thus obtain a residency position in the most highly ranked program on their list that has ranked them sufficiently high among its preferences. Each year, about 85 percent of participating United States medical students secure a place in one of their top 3 residency program choices." Pet. App. 160.

Petitioners are three former medical residents. Their complaint alleged a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and sought treble damages and injunctive relief

against 36 teaching hospitals, medical schools, and non-profit associations involved in graduate medical education. The complaint alleged a plaintiff class of more than 200,000 current and former medical residents, as well as a defendant class of more than 1000 teaching hospitals and other entities that participate in the Match. Neither a plaintiff class nor a defendant class had been certified prior to dismissal of the action.[1]

Petitioners' single-count complaint alleged a long-standing conspiracy that had the effect of depressing the level of stipends received by medical residents during their post-graduate training. The district court (Hon. Paul L. Friedman) observed that petitioners alleged "a single conspiracy with three interacting prongs": the Match, certain accreditation requirements for residency programs, and two information programs that collected and disseminated data about residency positions. Pet. App. 111.

Petitioners did not allege a traditional price-fixing conspiracy. Rather, they claimed that the three prongs of their conspiracy -- all of which were public, long-standing programs -- operated together with the effect of restraining competition over stipend levels. *E.g.*, Pet. App. 23 ("The complaint does not allege a price-fixing conspiracy but a single overarching integrated antitrust conspiracy with the Match as its centerpiece."); *id.* 26 ("Their pleading does not allege an agreement among residency programs to fix wages paid to residents.") (Order of the district court). The Match allegations were not mere "plus factors" in a standard price-fixing conspiracy case, as petitioners now inaccurately represent. Pet. 3, 5, 8. Rather, the Match was the "centerpiece" and "unifying element" of their claim. Pet.

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[1] The original complaint is not included in the Petition's appendix, but petitioners' post-judgment proposed amended complaint contains similar class allegations. *See* Pet. App. 187-90.

App. 23, 48 (Orders of the district court). In the words of the court of appeals: "The central premise of plaintiffs' complaint and its theory of liability turn entirely on the Matching Program." *Id.* 5.[2]

2. In direct response to this suit, Congress enacted Section 207 of the Pension Funding Equity Act of 2004, 15 U.S.C. § 37b ("Section 207"), entitled "Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs." Pet. App. 159-63. The statute, signed into law in April 2004, provides that participation in medical residency matching programs is not unlawful under the antitrust laws and that such participation may not be used to support any antitrust claim. § 207(b)(2). Section 207 includes extensive congressional findings on the history and purposes of the Match, and concludes that matching programs "have been an integral part of an educational system that has produced the finest physicians and medical researchers in the world." § 207(a)(1)(A).

In Section 207, Congress observed that antitrust lawsuits "challenging the matching process, regardless of their merit or lack thereof, have the potential to undermine this highly efficient, pro-competitive, and long-standing process." § 207(a)(1)(E). Congress expressed concern that the "costs of defending such litigation would divert the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research," potentially "lead[ing] to abandonment of the matching process, which has effectively served the

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[2] The suggestion (Pet. 4) that this case bears any relation to *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 2965 (2006) (No. 05-1126), is plainly wrong. Here, petitioners challenged specific practices involved in graduate medical education; and did not allege a "parallel conduct with plus factors" price-fixing conspiracy. Indeed, petitioners never used the term nor advanced the concept of "plus factors" in any of their briefs or pleadings below.

interests of medical students, teaching hospitals, and patients for over half a century." *Id.*

Accordingly, Congress provided that participation in the Match was not a violation of the antitrust laws:

> "It shall not be unlawful under the antitrust laws to sponsor, conduct, or participate in a graduate medical education residency matching program, or to agree to sponsor, conduct, or participate in such a program."

§ 207(b)(2). Further, in a second important operative provision, Congress provided that Match-related conduct could not be used to support any claim of an antitrust violation:

> "Evidence of any of the conduct described in the preceding sentence [just quoted above] shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws." *Id.*

As petitioners emphasize (*e.g.*, Pet. 5, 7, 9-10), Section 207 also contained a saving clause, but one framed in much narrower terms than petitioners acknowledge:

> "Nothing in this section shall be construed to exempt from the antitrust laws any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs."

§ 207(b)(3). As noted above, petitioners' complaint made no allegation of that nature.

By its terms, Section 207 was immediately effective and explicitly made applicable to pending suits. § 207(c).

3. In light of Section 207, defendants moved for judgment on the pleadings or, in the alternative, for dismissal for failure to state a claim. Given that various other motions were then pending, the district court "request[ed] guidance from the parties as to the most appropriate course of action

the Court should take in considering these various motions." Order of May 19, 2004. In response, making no mention of a potential amendment of their complaint to address the implications of Section 207, petitioners requested that the court first decide a motion that they had filed some months earlier (in March 2004, before the enactment of Section 207) requesting leave to file an *earlier* proposed amended complaint (*not* the amended complaint they proposed post-judgment (Pet. App. 164-237)) and then decide defendants' Section 207 motion.[3]

Thus, despite the enactment of Section 207, petitioners rested on their original theory -- embodied both in the original complaint and in their March 2004 proposed amended complaint -- that they had been injured by "a single conspiracy with three interacting prongs" (Pet. App. 111) with the Match at its center. Indeed, by that time the theory had also been endorsed by petitioners in multiple prior pleadings as well as in deposition testimony by each of them.[4]

The district court granted defendants' motion and dismissed the case. Observing that petitioners' complaint had alleged "a single overarching integrated antitrust conspiracy with the Match as its centerpiece" (Pet. App. 23), the court held that their complaint fell squarely within, and was precluded by, the new antitrust exemption:

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[3] The district court's Order of May 19, 2004, and petitioners' response, are found in the Joint Appendix prepared for the court of appeals (hereinafter "JA") at JA707-08 and JA710-11 respectively.

Petitioners did not argue to the district court -- and do not argue here -- that the amended complaint that they had proposed in March 2004 was any less vulnerable to dismissal under Section 207 than their original complaint.

[4] *E.g.*, JA173 (petitioners' brief on motion to dismiss); JA314-17, 429-30 (oral argument on motion to dismiss); JA908-12, JA914, JA917-21, JA925-26 (deposition testimony).

> "The Court concludes that the allegations concerning the Match and the institutional defendants' participation in the Match are so interdependent that the Court cannot separate them from the remaining allegations. Because Congress has prevented this or any other Federal court from considering evidence of Match-related conduct, the Court necessarily concludes that plaintiffs' complaint must be dismissed . . . ." *Id.* 25-26.

In response to petitioners' efforts to invoke Section 207's saving clause, the district court found no tension between (a) the provision in Section 207(b)(2) barring Match-related evidence in *any* antitrust claim and (b) Section 207(b)(3)'s preservation of any claim of an agreement to fix the amount of stipends: "Application of the [evidentiary] provision merely forbids invocation of the Match program as evidence in any antitrust suit, including one involving allegations of price-fixing; but price-fixing claims unrelated to the Match as described in Section 207(b)(3) are not affected." Pet. App. 27. The district court concluded that because petitioners' complaint "does not allege an agreement among residency programs to fix wages paid to residents," it fell outside the saving clause. *Id.* 26.

The district court also rejected petitioners' constitutional challenge to Section 207. In addressing their separation-of-powers argument, the court observed that Section 207 had "add[ed] a new antitrust exemption to the antitrust laws and new procedural or evidentiary restrictions on the prosecution of certain antitrust actions"; it did not, however, "prescribe a different finding, conclusion or result in the outcome of this or any other particular antitrust case." Pet. App. 31-32. Accordingly, in light of *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), and other authority, the court concluded that Section 207 represented a proper exercise of Congress's power to amend legislation, even if the

amendment potentially affected the outcome of pending litigation. Pet. App. 32.

The district court dismissed the complaint with prejudice and entered final judgment for the defendants. As of that time, petitioners had expressed no desire or intention to file a Match-free amended complaint in light of Section 207, and made "no attempt to demonstrate that absent the Match allegations . . . a conspiracy claim existed . . . ." Pet. App. 25. The district court further noted that "the burden cannot be on the Court to effectively rewrite the complaint . . . ." *Id.*

4. Before the ten-day jurisdictional deadline set forth in Fed. R. Civ. P. 59(e), petitioners filed a motion to alter or amend the judgment. Without challenging the correctness of the district court's ruling, including its dismissal of the complaint with prejudice, petitioners sought to modify the judgment to allow the filing of yet another amended complaint. The Rule 59(e) motion incorporated a motion, under Rule 15(a), for leave to file an amended complaint in which plaintiffs sought to allege -- for the first time and notwithstanding their prior pleadings and testimony -- an antitrust conspiracy based solely on the accreditation and information-dissemination prongs of the original complaint. Pet. App. 164-237. The sole ground stated in the Rule 59(e) motion was the potential *res judicata* effect of dismissal on the three named plaintiffs.

After defendants responded to the post-judgment motions, petitioners made a new filing -- well outside the ten-day jurisdictional bar -- that explicitly abandoned the sole ground on which they had sought post-judgment relief. Although styled as a "reply," in that filing petitioners asserted new and different theories for modification of the judgment. JA930-31 n.6. In a surreply, defendants pointed out that petitioners' "reply" was in reality a new Rule 59(e) motion that was jurisdictionally time-barred. *See* Pet. App. 46 n.1.

The district court denied all of petitioners' post-judgment motions. The court concluded that petitioners had not met

the standards for relief under Rule 59(e), given that, *inter alia*, "[p]laintiffs had both the time and the opportunity to request leave to amend their complaint prior to the Court's entry of judgment, but chose not to." Pet. App. 46. In the alternative, the court denied plaintiffs' motion to amend under Rule 15(a). The court found that, even under the liberal standards of that rule, amendment would be futile because petitioners' proposed complaint was starkly inconsistent with their own previous positions and the court's prior rulings (Pet. App. 47-48), and would be subject to successful renewed motions to dismiss both on personal-jurisdiction and merits grounds (*id.* 48-49).

Because the district court rejected plaintiffs' motions on the merits, it did not reach defendants' argument that petitioners' Rule 59(e) motion was time-barred. Pet. App. 46 n.1.

5. The court of appeals (Randolph, Griffith, and Edwards, J.) affirmed *per curiam* in a not-for-publication order. The court first held that the district court had correctly construed Section 207 to require dismissal of the complaint. Indeed: "It is hard to imagine a more precise fit between the language of a statute and a lawsuit." Pet. App. 3-4. The court recognized that petitioners' conspiracy claim fell squarely within Section 207's prohibition of antitrust claims based on Match-related conduct, as their conspiracy allegations were "inextricably intertwined" with the Match. *Id.* 4. Petitioners' "attempt to recast the allegations of the complaint as a price-fixing scheme independent of the Matching Program" was rejected because "[t]he complaint does not allege a price-fixing conspiracy, but a single over[arch]ing integrated antitrust conspiracy with the Match as its centerpiece." *Id.*, quoting the district court at *id.* 23. Recognizing that a price-fixing claim unrelated to the Match would fall within Section 207's saving clause, the court of appeals confirmed that petitioners' claim was not of that nature: "The Matching Program is the basis for plaintiffs' complaint . . . ." *Id.* 3.

The court of appeals had no difficulty disposing of petitioners' constitutional objection to Section 207. "Congress has done nothing more here than amend the antitrust laws by carving out a safe harbor for participation in [the Match]." Pet. App. 4. As confirmed by *Seattle Audubon* and other decisions of this Court, "Congress may amend substantive laws, even when doing so affects pending litigation." *Id.*

As for petitioners' argument that their complaint should not have been dismissed with prejudice, the court of appeals found no abuse of discretion. It recognized, as had the district court, that any amended complaint that sought to avoid Section 207 would be wholly at odds with the "central premise of plaintiffs' complaint and its theory of liability." Pet. App. 5-6.

Finally, the court of appeals affirmed the district court's denial of petitioners' post-judgment motions. "A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." Pet. App. 6-7 (internal quotations omitted). The court of appeals recognized that none of those factors was present here: the decision below neither contained clear error nor threatened manifest injustice. Further, recognizing that for several months after enactment of Section 207 petitioners took no steps to amend their complaint in light of the legislation -- and instead waited until after final judgment had been entered -- the court found no abuse of discretion in the district court's denial of the Rule 59(e) motion. *Id.* Rather, "'[b]y failing to advise the court in a timely fashion -- i.e., before the court ruled on the motion to dismiss' -- that they were willing to amend their Complaint in light of Section 207, plaintiffs 'forfeited any claim of an abuse of

discretio[illegible] *Id.* at 7, quoting *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C[illegible]. 2004).[5]

The court of appeals concluded its ruling as follows:

> "Nothing in the District Court's disposition or in ours precludes future plaintiffs from pursuing price-fixing claims against those defendants or related individuals or entities that are unrelated to the Matching Program." *Id.*

REASONS FOR DENYING THE PETITION

This case does not warrant the Court's review. The decisions below were the first ever to deal with the newly-enacted Section 207, and, as reflected in the unpublished decision of the court below, that statutory provision presents no issue requiring resolution by this Court. The lower courts were clearly correct in construing and applying the statute to the facts of this case, and petitioners' separation-of-powers argument is plainly without merit. There is no circuit split on these issues and no conflict with any decisions of this Court.

Nor do petitioners' two procedural issues -- whether dismissal should have been with prejudice and whether post-judgment relief should have been granted -- merit further review. Both are subject to the abuse-of-discretion standard, and on the facts here the district court's actions were entirely warranted -- as the court of appeals found. Petitioners deliberately and steadfastly committed themselves to a claim at odds with Section 207, and purposely waited until after judgment -- despite ample opportunities and a virtual invita-

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[5] In light of its ruling on the merits of the Rule 59(e) motion, the court of appeals neither reached petitioners' Rule 15(a) arguments nor addressed defendants/appellees' argument that the Rule 59(e) motion was time-barred. *See* Pet. App. 7.

tion from the district court to act earlier -- to float a markedly different claim that was at odds with their prior theories, representations to the district court, and sworn deposition testimony. Any purported differences in the standards articulated by various lower courts are, on the facts here, of no moment. That is especially true given both that the district court found petitioners' post-judgment complaint deficient even under liberal Rule 15(a) standards, and that petitioners' Rule 59(e) motion was untimely.

A. The Application of Section 207

Section 207 is a clearly drafted statute that raises no difficult issue of construction. Section 207(b)(2) provides that participation in the Match is not unlawful under the antitrust laws, and that no evidence of Match participation can be used to support *any* antitrust claim. Section 207(b)(3) provides that nothing in the statute exempts from the antitrust laws an agreement between medical residency programs to fix the amount of stipends. Thus, no antitrust claim -- including a Sherman Act § 1 conspiracy claim that may relate to pricing -- can be based on evidence of Match participation, but any claim alleging a conspiracy to fix stipend levels remains actionable if it can be proven without reliance on Match participation. These provisions effectuate the purposes of Section 207, which are expressly stated in the statute itself: to protect the Match from antitrust attack and to protect medical residency programs from having to defend against antitrust suits based in whole or in part on Match participation. § 207(a)(1), (2), Pet. App. 159-61.[6]

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[6] By quotation to Justice Scalia's concurrence in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 267 (2004) (Pet. at 2, 9), petitioners seem to imply that the lower courts impermissibly relied on legislative history in construing Section 207. In fact, neither of the lower courts even referred to legislative history. *See* Pet. App. 3-4, 20-27. Both construed Section 207 relying entirely on its unambiguous statutory language.

Particularly on the facts of this case, application of Section 207 was straightforward. As the court of appeals observed: "It is hard to imagine a more precise fit between the language of a statute and a lawsuit." Pet. App. 3-4. Petitioners' single-count conspiracy claim was "inextricably intertwined" with their Match allegations (*id.* 4), with the complaint alleging "a single overriding integrated antitrust conspiracy with the Match as its centerpiece" (*id.*). Indeed, the Match was the "central premise of plaintiffs' complaint and its theory of liability." *Id.* 5. As they do here, petitioners later "attempt[ed] to recast the allegations of the complaint as a price-fixing scheme independent of the Matching Program" (*id.* 4), but both the district court and court of appeals properly rejected those efforts to rewrite history. *See id.* 4, 23 ("The complaint does not allege a price-fixing conspiracy . . . ."), 24 ("plaintiffs' current position is inconsistent with plaintiffs' own previous position as set forth in their earlier filings").[7]

The lower courts properly rejected petitioners' implausible reading of the saving clause. It does not preserve all antitrust claims that allege some *impact* on resident stipends (which would largely nullify the section's operative provisions), but instead is limited to "any agreement on the part of 2 or more graduate medical education programs to *fix the amount* of stipend or other benefits . . . ." § 207(c) (emphasis added). As the courts below observed, petitioners made no allegations of that sort. Moreover, there is no tension between the saving clause and Section 207(b)(2)'s

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[7] Petitioners claim that the lower courts' characterizations of their complaint are "inaccurate." Pet. 8. However, the two lower courts -- in full agreement with each other -- accurately described the complaint, and their descriptions were confirmed repeatedly by petitioners' own representations in the district court. *See, e.g.*, note 4 *supra*. In any event, any asserted misreading of their complaint hardly raises an issue of sufficient importance to warrant an exercise of this Court's supervisory powers.

bar on use of Match-related evidence to support *any* antitrust claim. If, without Match-related evidence, a plaintiff can prove an agreement within the scope of the saving clause, the claim is preserved. If not, the claim is barred.

This common-sense reading of Section 207 does not render the saving clause "a nullity," as petitioners argue. Pet. 8. Suppose, for example, that a plaintiff could prove -- independently of Match evidence -- that two residency programs in the same city had reached an agreement to fix the amount of stipends for first-year radiology residents. The saving clause ensures that the defendants in such a case could not claim Section 207 immunity on the ground that the residents were selected by the defendants through the Match. If a plaintiff can prove an illegal agreement without reference to Match evidence, Section 207 provides no shelter.

A statute should be construed in its entirety, taking into account its purpose and context. *Dolan v. U.S. Postal Serv.*, 126 S. Ct. 1252, 1257 (2006). *See also United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole."). The lower courts followed this maxim of construction and correctly applied Section 207 to the facts of this case.

B. The Constitutionality of Section 207

While statutes should be construed if possible to avoid "*serious* constitutional problems" (*Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (emphasis added) (*see* Pet. 10), this principle does not call for distortion of statutory language whenever a litigant makes a constitutional challenge. Here, no serious constitutional issue is present. As this Court has repeatedly recognized, the Constitution is not implicated when Congress amends the governing law even when doing so affects pending cases. *E.g.*, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992). That is all that happened here.

Petitioners' contrary argument (Pet. 10-13) rests on *United States v. Klein*, 80 U.S. 128 (1871), a case from the Reconstruction era. There, Congress enacted legislation that purported to reverse the effect of pardons issued by President Andrew Johnson, directing this Court (and lower courts) to treat pardons as conclusive proof of collusion with the Confederacy, rather than the opposite as specified in the pardons themselves. Klein had relied on a pardon to obtain a judgment against the United States (to recover property confiscated by the Union army), and the legislation specifically directed the Court to vacate such judgments and to replace them with judgments for the government. 80 U.S. at 134. The Court struck down the legislation as infringing the President's constitutional pardon powers and also as violating the principle of separation of powers. As to the latter point, the legislation did not alter the governing law, but instead barred the court from giving "the effect to evidence which, in its own judgment, such evidence should have, *and . . . directed [the court] to give it an effect precisely the opposite.*" *Id.* at 147 (emphasis added).[8]

As the Court later observed, *Klein* held only "that [the Court] would not serve as an instrument toward the legislative end of changing the effect of a Presidential pardon." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980). *Klein* has been read narrowly,[9] and indeed no case

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[8] Petitioners quote this sentence three times (Pet. 11, 12-13), but each time omit the important italicized clause. Significantly, Section 207 did not direct any court to make any particular factual findings.

[9] *See, e.g., United States v. Brainer*, 691 F.2d 691, 695 & n.7 (4th Cir. 1982) (*Klein* should be read "quite narrow[ly]," for "[a] broader reading . . . would conflict with the Supreme Court's recognition that, subject to the requirements of due process, 'Congress has power to prescribe what evidence is to be received in the courts of the United States.'") (quoting *Tot v. United States*, 319 U.S. 463, 467 (1943)); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1217 (10th Cir. 2005) (Continued...)

has ever applied the decision to invalidate legislation that changed either substantive or evidentiary rules, even when those changes affected the outcome of pending cases. Congress frequently adopts evidentiary exclusions,[10] and we are aware of none that has been held unconstitutional on separation-of-power grounds.[11]

Petitioners' reliance on *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995) (Pet. 11), is equally misplaced, as that case involved the distinct issue of whether Congress could require federal courts to reopen final judgments that had been entered before a statute's enactment. In fact, *Plaut* wholly undermines the argument petitioners advance here, as the Court observed in *Plaut*: "Whatever the precise scope of

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("Although *Klein* might be read broadly, it has been significantly limited by subsequent Supreme Court decisions.").

[10] *E.g.*, 15 U.S.C. § 4305(g)(2) (no action by the Attorney General or FTC pursuant to the notification provision of the National Cooperative Research and Production Act "shall be admissible into evidence . . . for the purpose of supporting or answering any claim under the antitrust laws"); 49 U.S.C. § 10706(a)(3)(B)(ii) ("[i]n any proceeding in which [an antitrust violation] is alleged, evidence of a discussion or agreement between or among such rail carrier[s] . . . shall not be admissible . . ."); 15 U.S.C. § 2074(b) ("The failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible . . . .").

[11] *See* Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 Wis. L. Rev. 1189, 1233-38 (1981) ("it is clear that *Klein* does not contain a holding striking down a congressional attempt to interfere with the Court's evidentiary or fact-finding processes"). Petitioners attempt to cast Congress' enactment of Section 207 as the act of a trespasser who "may not interfere with the Judiciary's proper fact-finding" (Pet. 11), but Congress has a major role in developing evidentiary rules, including the Federal Rules of Evidence adopted by orders of this Court. *E.g.*, *United States v. Abel*, 469 U.S. 45, 49 (1984) ("It must be remembered that Congress extensively reviewed our submission [on the Rules], and considerably revised it.").

Klein . . . later decisions have made clear that its prohibition does not take hold when Congress amends applicable law." 514 U.S. at 218 (internal punctuation omitted). Those later decisions include *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), which the courts below found controlling. *Seattle Audubon* upheld a statute enacted in response to environmental challenges to proposed timber harvesting. The statute set forth new conditions for such harvesting and stated: "Congress hereby determines and directs that" compliance with those conditions would satisfy statutory requirements that had formed the basis of the pending environmental suits. *Id.* at 433-35. The Ninth Circuit held the statute unconstitutional under *Klein*, but this Court reversed. The Court held the statute did not "direct any particular findings of fact or applications of law, old or new, to fact," but rather modified the governing substantive law. 503 U.S. at 438.[12]

Seattle Audubon is illustrative of many cases upholding Congress's power to enact legislation, similar to Section 207, that affects the course of pending litigation. *E.g.*, *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (*Klein* "cannot be read as a prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure [an] outcome [for a particular litigant]."); *Imprisoned Citizens*

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[12] *See* 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 284 (3d ed. 2000):

> "The lesson of *Seattle Audubon* is that Congress is not barred by separation-of-powers considerations from changing the law applicable to an identifiable set of cases pending in the federal courts, even when that is Congress' clear purpose, provided it does so by altering the background law *itself* and not by purporting to tell Article III judges how they are to *apply* pre-existing law to particular cases pending in their courts." (Emphasis in original.)

Union v. Ridge, 169 F.3d 178, 187-88 (3d Cir. 1999) (*Klein* does not bar legislation that changes the law, only legislation that compels particular results under old law); *Ozee v. American Council on Gift Annuities*, 143 F.3d 937 (5th Cir. 1998) (applying newly enacted antitrust immunity to dismiss a pending suit). So long as Congress changes the governing law and does not simply direct a specific result under prior law, no *Klein* issue is present.

For that reason, there is no *Klein* issue in this case. As the lower courts here recognized, Section 207 unambiguously altered substantive legal rights and obligations. It provides an explicit antitrust exemption for Match participation, and it adopts a new evidentiary rule for antitrust cases brought in federal court, effectively creating a statutory exception to the *American Tobacco* doctrine upon which petitioners relied below in opposing early motions to dismiss.[13] As the district court stated, "by enacting [Section 207,] Congress changed the scope of permissible antitrust claims that may be resolved by the Federal courts" (Pet. App. 31); it did so in a manner that "has application to actions beyond this lawsuit" (*id. 32*); and it did not "prescribe a different finding, conclusion, or result in the outcome of this or any other particular antitrust case" (*id.*). *See also id.* 4-5 (similar analysis by the court of appeals). Accordingly, no constitutional issue under *Klein* or any other decision of this Court is presented here.[14]

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[13] *See American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) (acts "in themselves wholly innocent" may nonetheless be part of a conspiracy if such acts are undertaken "to accomplish the unlawful objective"). *See also* Pet. 10 (invoking *American Tobacco*).

[14] Petitioners object to the "one-way" feature of Section 207(b)(2), as it appears to preclude Match evidence only "to support" an antitrust claim. Pet. 12-13. However, the Federal Rules of Evidence are frequently asymmetrical, allowing evidence to be used for one purpose but not another, or by one party but not the other. *See, e.g.*, Rule 404(b) (evidence of prior crimes or acts admissible for some purposes but not others); 404(a)(1) (Continued...)

C. Dismissal of the Complaint with Prejudice

The district court dismissed the complaint with prejudice, and the court of appeals found no abuse of discretion. The rulings were correct and do not warrant further review. Dismissal for failure to state a claim is appropriate "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[15] Here, the dismissal was not for a technical pleading defect but instead was "on the merits." Under Section 207, petitioners' claim was fundamentally unsound and required that the litigation not go forward. *See, e.g., Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 917 (6th Cir. 1986) ("Where a statutory right is being pursued . . . and the defense raised is that the plaintiff or defendant does not come within the purview of the statute, the judicial acceptance of the defense, however it is accomplished, is the death knell of the litigation . . . .").

In claiming that dismissal with prejudice in this case was inconsistent with decisions of this Court and other circuits

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("[e]vidence of a person's character or a trait of character is not admissible [by the prosecution] for the purpose of proving action in conformity therewith on a particular occasion," but may be offered by the accused to prove his own good character); 609 (evidence of prior conviction admissible for some purposes but not others); 803(8)(C) (defendant may introduce evidence of public records against the government, but the government cannot offer such evidence against a defendant). We are aware of no decisions questioning such rules on constitutional grounds.

[15] A dismissal for failure to state a claim is presumptively on the merits and with prejudice. *See* Rule 41(b); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001) (Rule 41(b)'s provision that a dismissal order is presumptively "upon the merits" means that the dismissal is with prejudice).

(Pet. 13-20),[16] petitioners fail to recognize the distinction between a court's dismissal with prejudice and a court's denial of a motion for leave to amend. While both actions are reviewed under the abuse-of-discretion standard, they are nonetheless distinct (although at times related) steps in the litigation and subject to different standards in the district court.[17]

Petitioners rely heavily on *Foman v. Davis*, 371 U.S. 178 (1962), but -- contrary to their representation (Pet. 13) -- that decision did not address when a complaint should or should not be dismissed with prejudice; it addressed only the issue of when a motion for leave to amend a complaint should be granted. (In addition, petitioners misstate the holding of *Foman* on that issue. *See* Part D *infra*.) Likewise, a number of the cases cited by petitioners for their proposed standard for dismissal with prejudice are appeals from denials of motions for leave to amend -- not challenges to a dismissal with prejudice where, as here, the amended complaint in question had not been offered prior to dismissal.[18]

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[16] Petitioners appear to be primarily concerned with the development of the law in the Ninth Circuit. Pet. 16-17. A case from that circuit would be a better vehicle to address any certiorari-worthy questions related to that court's treatment of dismissals with prejudice.

[17] *See, e.g., Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("denial of leave to amend and dismissal with prejudice are two separate concepts").

[18] *E.g., Doe v. Cassel*, 403 F.3d 986, 991 (8th Cir. 2005); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005). Others simply do not support petitioners' position. *See U.S. ex rel. Adrian v. Regents of the University of California*, 363 F.3d 398, 403 (5th Cir. 2004) (affirming dismissal with prejudice without leave to file a new amended complaint); *Van Buskirk v. The New York Times Co.*, 325 F.3d 87, 91 (2d Cir. 2003) (affirming dismissal with prejudice; "a district court need not as a matter of course dismiss a complaint without prejudice to an attempted amendment of the pleadings").

It is well-established that it is a matter of discretion, not legal error, if a district court declines *sua sponte* to offer a plaintiff an opportunity to amend a complaint where the amendment in question is not offered prior to judgment.[19] Much depends on the nature of the defect in the initial complaint. Where a pleading suffers from a readily curable technical defect, as in many of the cases cited by petitioners (Pet. 15), dismissal will generally be with leave to amend. *E.g.*, *Lebron-Rios v. U.S. Marshal Serv.*, 341 F.3d 7, 15 (1st Cir. 2003) (failure to exhaust administrative remedies prior to filing suit); *Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 (4th Cir. 1999) (failure to plead with sufficient specificity to provide notice of the claim).[20] But this does not in any way translate into an absolute rule, as proposed by petitioners, requiring that dismissals on the merits always be without prejudice if one can imagine an amended complaint – wholly at odds with the claim of the original complaint – that might survive a motion to dismiss. If that were the rule, virtually no dismissal with prejudice could withstand appeal.

Here, the district court properly dismissed the complaint with prejudice in light of petitioners' failure to make any "attempt to demonstrate that absent the Match allegations, the Court in fact would have to come to the conclusion that a

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[19] *See, e.g.*, *James Cape & Sons, Co. v. PCC Constr. Co.*, 453 F.3d 396, 400-01 (7th Cir. 2006); *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 699 (6th Cir. 2004); *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 242 (1st Cir. 2004); *Van Buskirk*, 325 F.3d at 91; *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc); *Calderon v. Kansas Dep't of Social & Rehab. Servs.*, 181 F.3d 1180, 1186-87 (10th Cir. 1999); *Confederate Mem'l Ass'n v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993).

[20] Similarly, *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970) (dictum) (Pet. 14), involved a union-representation case where special leniency in pleading is allowed. *Alston v. Parker*, 363 F.3d 229 (3d Cir. 2004) (Pet. 15), involved the incorrect imposition by the district court of a heightened pleading requirement.

conspiracy existed based solely on the remaining prongs." Pet. App. at 25. Petitioners had ample opportunity to offer such an amended complaint prior to a decision on the motion to dismiss. Indeed, before deciding the motion, the district court requested guidance from the parties as to how to proceed. Petitioners could then have offered an amended complaint that addressed Section 207 or, at a minimum, indicated a willingness or intention to do so. For whatever strategic reasons, they declined to do so, and instead urged the court to decide defendants' Section 207 motion on the basis of their original theory and the amended complaint that they had proposed prior to enactment of Section 207, which asserted the same basic claim of an integrated conspiracy centered on the Match.[21]

As the Court said in *Nietzke v. Williams*, 490 U.S. 319, 329 (1989): "Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon." Petitioners had that opportunity here, and more. On the facts of this case, review by this Court is not warranted.[22]

D. Denial of Petitioners' Post-Judgment Motions

The denial of petitioners' post-judgment motions does not present an issue worthy of the Court's attention. First, the motions were time-barred under the 10-day jurisdictional

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[21] Petitioners had obviously drafted, but elected not to file, their 159-paragraph second amended complaint, signed by no less than 36 lawyers (Pet. App. 164-237), for it was submitted to the district court within days of entry of judgment.

[22] Indeed, as addressed further in Part D, petitioners' case would have been dismissed under virtually any standard, as they failed in their post-judgment motions to satisfy even the liberal requirements of Rule 15(a). Pet. App. 47-49.

deadline in Rule 59(e). In any event, the district court was well within its discretion in refusing to reopen the final judgment to allow an amended complaint, because, *inter alia*, petitioners' delay in seeking leave to amend stemmed solely from their own strategic choices.[23] Any differences in the standards applied by the circuit courts to post-judgment efforts to amend pleadings are inconsequential, and would not in any event have caused any other court to reach a different result in this case.

1. A motion under Rule 59(e) must be brought within ten days of entry of judgment. Fed. R. Civ. P. 59(e). This deadline is jurisdictional, and it may not be extended. Fed. R. Civ. P. 6(b); *see Derrington-Bey v. D.C. Dep't of Corrections*, 39 F.3d 1224, 1225 (D.C. Cir. 1994); *Vargas v. Gonzalez*, 975 F.2d 916, 917 (1st Cir. 1992). Further, a Rule 59(e) motion must "specifically identify those matters which [movant] believes [the] court has overlooked and why those matters would render [the] court's prior decision erroneous." 11 Charles A. Wright *et al.*, FEDERAL PRACTICE & PROCEDURE § 2817 n.1 (2d ed. 1995).

Petitioners' initial Rule 59(e) motion raised a single ground: absent amendment of the judgment, *res judicata* would bar their efforts to assert new claims based on non-Match allegations, a result that plaintiffs argued would be manifestly unjust. JA827-28. In their reply brief -- filed more than 50 days after entry of judgment -- petitioners explicitly withdrew that ground, concluding on the basis of "defendants' response and further research" that this asserted basis for relief was in error. JA930-31 n.6. They then advanced an entirely new and different Rule 59(e) motion, one based on the Clayton Act statute of limitations and a

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[23] *See, e.g.*, note 21 *supra*.

claim that Section 207 was an "intervening" change in controlling law.

That belated effort was time-barred. The ten-day requirement of Rule 59(e) is firm; circumventing the requirement by amending the motion or adding new grounds is prohibited. *See, e.g., Parisie v. Greer*, 705 F.2d 882, 892 (7th Cir. 1983) (Posner, J., concurring) (If a party could file a non-substantive post-judgment motion and add substantive grounds only later, "the 10-day limit in Rule 59(e) would be circumvented."); *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, 207 F. Supp. 2d 292, 294-95 n.4. (S.D.N.Y. 2002) ("[P]ermitting defendants to raise a new ground for reconsideration in a reply memorandum would allow defendants to violate the intent of Rule 59(e).").[24]

The lower courts declined to reach the jurisdictional issue (*see* Pet. App. 6-7, 46 n.1) in light of petitioners' failure to satisfy either the Rule 59(e) or Rule 15(a) standards for post-judgment relief. The jurisdictional time limit remains, however, an absolute bar to any relief sought by petitioners' post-judgment motions, and renders this case an inappropriate vehicle for further review of the rulings on those motions.

2. Furthermore, the lower courts' treatment of petitioners' post-judgment motions does not reveal any real conflict among the circuits. Petitioners overstate the distinctions between the D.C. Circuit's standard for post-judgment leave to amend and the assertedly more liberal standards of some other circuits. Decisions under Rule 59(e) and Rule 15(a) are

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[24] *See also Charles v. Daley*, 799 F.2d 343, 347-48 (7th Cir. 1986) ("The time limit would be a joke if parties could continually file new motions, preventing the judgment from becoming final. The 10 days runs from the initial judgment, so later motions are not timely."); *McCarthy v. Manson*, 554 F. Supp. 1275, 1284-85 n.9 (D. Conn. 1982) (rejecting effort to supplement original "cryptic" Rule 59(e) motion with a subsequent memorandum that laid out grounds with more specificity), *aff'd on other grounds*, 714 F.2d 234 (2d Cir. 1983).

left in all circuits to the considerable discretion of the district court; although the circuits may use different words in describing how the district court should exercise that discretion, the standards are by no means incompatible. *See, e.g., Ciralsky v. CIA*, 355 F.3d 661, 673-74 (D.C. Cir. 2004) (even though district court did not abuse its discretion in declining to reopen judgment to allow an amended complaint, the cause was nonetheless remanded so that the district court could reconsider its decision); *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (reversing denial of Rule 59(e) motion where district court should have permitted opportunity to amend complaint); *Laber v. Harvey*, 438 F.3d 404, 432-33 (4th Cir. 2006) (Wilkinson, J., concurring) ("motions filed post-judgment for leave to amend a complaint are not favored under law" and highlighting the "unique" circumstances permitting post-judgment amendment in that case); *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002) ("[W]hile Rule 15 plainly embodies a liberal amendment policy, in the post-judgment context, we must also take into consideration the competing interest of protecting the finality of judgment and the expeditious termination of litigation.") (internal quotations omitted).

This is particularly true with respect to the sole issue presented by petitioners: whether it was an abuse of discretion to deny reopening of the judgment and leave to amend where petitioners had made a strategic decision to pursue a different motion to amend -- and to sit on their ultimate proposed amended complaint -- until after entry of judgment.[25] Petitioners' argument rests on the notion that

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[25] Petitioners (Pet. 25) improperly conflate that issue with the separate question of what for Rule 15(a) purposes constitutes "undue delay" in the pre-judgment context. *See Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1205 (10th Cir. 2006) (collecting cases involving pre-judgment efforts to amend pleadings).

they necessarily would have obtained leave to amend in other circuits, but there is no support for that premise. To the contrary, district courts in those circuits would have been well within their discretion to deny petitioners' motions. *See, e.g., Palmer v. Champion Mortg.*, 465 F.3d 24, 30-31 (1st Cir. 2006) (even under liberal Rule 15(a) pleading standards, within district court's discretion to deny leave to amend where plaintiff had no valid reason to wait until after dismissal to seek leave); *In re Adams Golf, Inc. Securities Litigation*, 381 F.3d 267, 280 (3d Cir. 2004) ("District Court did not err in refusing to open the judgment of dismissal when plaintiffs clearly relied on 'misplaced confidence' in their original pleading."); *Schiller v. Physicians Resource Group Inc.*, 342 F.3d 563, 569 (5th Cir. 2003) ("Because the Fourth Amended Complaint was not based on newly discovered evidence that was unavailable prior to the district court's judgment, we find that the district court did not abuse its discretion in denying Alpert Group's Rule 59(e) motion."); *McWhorter*, 290 F.3d at 800 ("[I]n the post-judgment context, we must be particularly mindful of . . . the movant's explanation for failing to seek leave to amend prior to the entry of judgment.").[26]

Nothing in this Court's decision in *Foman v. Davis* suggests that the lower courts reached an incorrect result in this case. The holding of *Foman* is narrow -- leave to amend

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[26] Both the Third and Fifth Circuit decisions cited above explicitly reference the earlier decisions of those courts relied upon by petitioners (Pet. 22-23). *See In re Adams Golf, Inc. Securities Litigation*, 381 F.3d at 280 (citing *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 272 (3d Cir. 2001)); *Schiller*, 342 F.3d at 569 (discussing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003)); *see also Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000) ("[W]here a party seeks to amend her complaint after entry of judgment, 'we have consistently upheld the denial of leave to amend where the party seeking to amend has not clearly established that he could not reasonably have raised the new matter prior to the trial court's merits ruling.'") (citation omitted).

should be given absent any "apparent or declared reason" to the contrary, and a district court abuses its discretion when it denies leave to amend without explaining the basis for its action. *See Foman*, 371 U.S. at 182. *Foman* does not stand for the proposition that leave to amend must be granted automatically, or that a plaintiff's deliberate decision to delay amendment until after judgment is an invalid reason to deny leave to amend, and certainly does not preclude circuits from structuring standards for Rule 59(e) motions seeking leave to amend that are consistent with *Foman*'s narrow holding.

Here, the D.C. Circuit examined the circumstances surrounding petitioners' failure to move to amend, and properly concluded that this failure supported the district court's sound exercise of its discretion in denying leave to reopen the judgment. Pet. App. 6-7, 44-49. In the face of enactment of Section 207 and the district court's request to the parties on how to proceed, petitioners pointed not to the possibility of a new, Match-free complaint, but instead to a previously filed proposed amended complaint that continued -- like their original complaint -- to include the Match as its centerpiece. Only after judgment did they unveil yet another proposed complaint which -- quite clearly -- had been at the ready for some time.[27] The decision of the lower courts to reject such tactics is not inconsistent with either the language or spirit of *Foman*.

In fact, *Foman* provides an additional reason why the Court's further review of this case is not warranted. After denying petitioners' Rule 59(e) motion, the district court nevertheless examined their proposed amended complaint under the liberal standards of Rule 15(a) and found that the proposed amendment would be futile. Pet. App. 47-49. That determination was an additional proper "justifying reason"

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[27] *See* note 21 *supra*.

for denying leave (*see Foman*, 371 U.S. at 182 (futility proper ground for denying Rule 15(a) motion)), and an additional reason why there is no justification for review here.[28]

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As the court of appeals observed: "Nothing in the District Court's disposition or in ours precludes future plaintiffs from pursuing price-fixing claims against those defendants or related individuals or entities that are unrelated to the Matching Program." Pet. App. 7. Thus, the only issue truly presented in this case is whether *these three petitioners*, having committed themselves -- in pleadings, representations to the court, and sworn testimony -- to a claim of a "single, overarching conspiracy" that included the Match as its core, may abruptly switch course after judgment and be allowed to pursue -- purportedly as class representatives -- a claim sharply at odds with the one to which they committed. It was not an abuse of discretion for the lower courts to answer that question in the negative. No further review is warranted.

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[28] In *Foman*, the plaintiff sought merely to add an "alternative theory of recovery" to his existing facts; the "underlying facts or circumstances relied upon" were, he argued, "a proper subject of relief," and the proposed amendment would affect only the legal theory under which those facts were presented. *See Foman*, 371 U.S. at 179, 182. By contrast, petitioners' complaint was dismissed precisely because the underlying facts and circumstances were *not* a proper subject of relief, and that fatal flaw could not be cured by amendment.

CONCLUSION

The petition for writ of certiorari should be denied.

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November 22, 2006

CORPORATE DISCLOSURE STATEMENTS

1. The Accreditation Council for Graduate Medical Education ("ACGME") is an Illinois nonprofit corporation with its principal place of business in Chicago, Illinois, and its general nature and purpose is to accredit programs in graduate medical education. The undersigned counsel for ACGME certifies that, to the best of his knowledge and belief, ACGME does not have any parent companies, and no publicly-held company has any ownership interest in ACGME. Five other nonprofit entities, the Association of American Medical Colleges, the American Medical Association, the American Hospital Association, the American Board of Medical Specialties, and the Council of Medical Specialty Societies, are the members of ACGME.

2. The American Medical Association, a not-for-profit association, is the nation's largest association of physicians. The AMA, whose membership includes physicians, resident physicians and medical students, strives to promote the interests of patients and the physicians who serve them. The undersigned counsel for the American Medical Association certifies that, to the best of his knowledge and belief, no parent, subsidiary, or affiliate of the American Medical Association has any outstanding securities in the hands of the public.

3. The Association of American Medical Colleges is a nonprofit association of medical schools, teaching hospitals, and academic societies. The AAMC seeks to improve the nation's health by enhancing the effectiveness of academic medicine. The undersigned counsel of record for the Association of American Medical Colleges certifies that, to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of Association of

American Medical Colleges which have any outstanding securities in the hands of the public: None.

4. Barnes-Jewish Hospital is a non-profit corporation incorporated in Missouri, with its principal place of business in St. Louis, Missouri. Its activities include providing patient care, scientific research, community service and educational activities related to the care of the sick and injured in the St. Louis community. The undersigned counsel of record for Barnes-Jewish Hospital certifies that, to the best of his knowledge and belief, no parent companies, subsidiaries or affiliates of Barnes-Jewish Hospital have any outstanding securities in the hands of the public. Barnes-Jewish Hospital has issued tax exempt bonds through the Missouri Health and Educational Facilities Authority in the past.

5. The undersigned counsel of record for Defendant-Appellee Baylor College of Medicine hereby certifies that, to the best of his knowledge and belief, Baylor College of Medicine is a Texas non-profit public benefit corporation without corporate parent and no publicly-held company has any ownership interest in Baylor College of Medicine. Baylor College of Medicine operates an educational institution in Houston, Texas, that grants various degrees in medicine and conducts graduate medical education training programs for resident physicians.

6. Beth Israel Medical Center is a non-profit corporation organized under the laws of New York with its principal place of business in New York, New York. Beth Israel Medical Center is a full-service tertiary teaching hospital that serves individuals and families from New York City and its environs. The undersigned counsel of record for Beth Israel Medical Center certifies to the best of his knowledge and belief that Continuum Health Partners, Inc. is

the only parent company of Beth Israel Medical Center, and that no publicly-held company has a 10% or greater ownership interest in Beth Israel Medical Center.

7. The undersigned counsel for Beth Israel Deaconess Medical Center, Boston Medical Center, Rhode Island Hospital, Thomas Jefferson University Hospital, and Yale-New Haven Hospital certify that, to the best of their knowledge and belief, no parent, subsidiary or affiliate of the defendants-appellees herein listed has any outstanding securities in the hands of the public. BIDMC's sole Member is CareGroup, Inc., a Massachusetts non-profit charitable corporation. Boston Medical Center, and CareGroup and certain of its affiliates, have issued tax-exempt bonds through the Massachusetts Health and Educational Facilities Authority in the past. Rhode Island Hospital has a sole corporate member, Lifespan Corporation; Lifespan Corporation is also the sole corporate member of The Miriam Hospital and the respective fund-raising entities for each hospital, namely, Rhode Island Hospital Foundation and The Miriam Hospital Foundation. The two hospitals and the two foundations comprise a single Obligated Group which has, from time to time, issued tax-exempt bonds through the Rhode Island Health and Education Building Corporation.

8. Cedars-Sinai Medical Center is a nonprofit, public benefit corporation and acute care hospital located in Los Angeles, California. Among its missions, Cedars-Sinai Medical Center educates medical residents. The undersigned counsel of record for Cedars-Sinai Medical Center certifies that to the best of his knowledge and belief, Cedars-Sinai Medical Center has no parent companies, subsidiaries or affiliates which have any outstanding securities in the hands of the public. Cedars-Sinai has issued tax exempt bonds through the California Health Facilities Financing Authority and other California state Authorities in the past.

9. The Cleveland Clinic Foundation is a not-for-profit corporation in Cleveland, Ohio organized under the law of Ohio and based in Ohio. Among its missions, The Cleveland Clinic Foundation educates medical residents. The undersigned counsel of record for The Cleveland Clinic Foundation certify that, to the best of their knowledge and belief, The Cleveland Clinic Foundation has no parent companies, subsidiaries or affiliates which have any outstanding securities in the hands of the public.

10. Duke University Health System, Inc., is a not-for-profit health care system committed to excellence, innovation and leadership in meeting the health care needs of the people it serves, improving community health, and fostering the very best medical education and biomedical research. The undersigned counsel of record for Duke University Health System, Inc., certifies that, to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of Duke University Health System which have any outstanding securities in the hands of the public: None.

11. Emory University is a private, non-sectarian university incorporated under the laws of the State of Georgia with its principal place of business in Atlanta, Georgia. The undersigned counsel of record for Emory University certifies that to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of Emory University which have any outstanding securities in the hands of the public: None.

12. The George Washington University is a private, non-sectarian university consisting of 19,000 students in nine schools. The George Washington University is a non-profit corporation chartered by Congress, with its principal place of business in Washington, D.C. The undersigned counsel of

record for The George Washington University certifies that to the best of his knowledge and belief there are no parent companies or any publicly held company that has a 10% or greater ownership interest in The George Washington University.

13. The undersigned counsel for Henry Ford Health System and William Beaumont Hospital certify that, to the best of their knowledge and belief, no parent, subsidiary or affiliate of Henry Ford Health System or William Beaumont Hospital has any outstanding securities in the hands of the public. The general nature and purpose of Henry Ford Health System is operation of a full-service teaching hospital in Detroit, Michigan. The general nature and purpose of William Beaumont Hospital is operation of a full-service teaching hospital in Royal Oak, Michigan.

14. The undersigned counsel for the Massachusetts General Hospital hereby state that the non-profit General Hospital Corporation d/b/a Massachusetts General Hospital has as its sole member The Massachusetts General Hospital corporation, which in turn has as its sole member Partners Healthcare System, Inc. The general nature and purpose of the Massachusetts General Hospital is operation of a full-service teaching hospital in Boston, MA.

15. The undersigned counsel for the McGaw Medical Center of Northwestern University ("McGaw Medical Center") state that it is an Illinois nonprofit corporation, and that its general nature and purpose is to encourage joint planning and improvement in resource allocation and utilization relating to graduate medical education, research and other community based activities. McGaw Medical Center is comprised of the following parent companies: Evanston Northwestern Healthcare, Children's Memorial Hospital, Northwestern Memorial Hospital, Rehabilitation

Institute of Chicago, Northwestern University, and VA Chicago Health Care System.

16. MedStar Georgetown Medical Center, Inc. (incorrectly identified in Plaintiffs' Complaints as MedStar Georgetown Hospital Medical Center, Inc.) and MedStar Health, Inc. are membership corporations, incorporated in the District of Columbia and Maryland, respectively, engaged in, among other activities, the provision of patient care and graduate medical education and training. The undersigned counsel of record for MedStar Georgetown Medical Center, Inc. and MedStar Health, Inc., certifies that to the best of his knowledge and belief there are no parent companies, subsidiaries or affiliates of MedStar Georgetown Medical Center, Inc. or MedStar Health, Inc. which have any outstanding securities in the hands of the public.

17. Mount Sinai School of Medicine of New York University is one of the world's foremost centers for medical and scientific training. The School provides undergraduate medical education to students on its campus in New York City and sponsors graduate medical education programs at 13 hospitals in the New York metropolitan area. Mount Sinai School of Medicine has been affiliated with New York University since July 1999. The undersigned counsel of record for Respondent Mount Sinai School of Medicine of New York University certifies that, to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of Mount Sinai School of Medicine of New York University which have any outstanding securities in the hands of the public: None.

18. The National Resident Matching Program ("NRMP") is an Illinois not-for-profit corporation with its principal place of business in Washington, D.C. The NRMP does not have any parent companies. Five medical/medical

education organizations and four medical student organizations nominate candidates for election to the NRMP's board of directors but do not elect board members. Those organizations are the American Board of Medical Specialties, the American Medical Association, the Association of American Medical Colleges, the American Hospital Association, the Council of Medical Specialty Societies, the Association of American Medical Colleges Organization of Student Representatives, the American Medical Student Association, the Medical Student Section of the American Medical Association, and the Consortium of Medical Student Organizations.

19. The New York and Presbyterian Hospital ("New York-Presbyterian") operates full service teaching hospitals in New York City. The undersigned counsel of record for New York-Presbyterian certifies that to the best of his knowledge and belief, neither New York-Presbyterian, nor any parent companies, subsidiaries or affiliates have any outstanding securities in the hands of the public.

20. Rush University Medical Center, formerly known as Rush-Presbyterian-St. Luke's Medical Center, is a nonprofit, independent healthcare organization located in Chicago, Illinois. Among its missions, Rush educates medical residents. The undersigned counsel for Rush University Medical Center certify that to the best of their knowledge and belief there are no parent companies or any publicly held company that has a 10% or greater ownership interest in Rush University Medical Center.

21. Saint Louis University is a Missouri pro forma corporation formed under the Missouri Revised Statutes, Chapter 352. Among its educational missions, Saint Louis University sponsors a graduate medical education program. The undersigned counsel of record for Saint Louis University

certifies that to the best of his knowledge and belief, Saint Louis University has no parent companies, subsidiaries or affiliates which have any outstanding securities in the hands of the public. Saint Louis University has issued tax exempt bonds through the Missouri Health and Educational Facilities Authority in the past.

22. Stanford Hospital & Clinics is a non-profit corporation incorporated in California, with its principal place of business in Palo Alto, California. Its activities include providing patient care, community service and education related to the care of the sick and injured in the San Francisco Bay Area. The undersigned counsel of record for Stanford Hospital & Clinics certifies that to the best of his knowledge and belief Stanford Hospital & Clinics has no parent companies, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

23. Strong Memorial Hospital of the University of Rochester is an educational non-profit corporation organized under the laws of New York with its principal place of business in Rochester, New York. Its activities include providing a comprehensive range of general and highly specialized patient care services to the sick and injured. The undersigned counsel of record for Strong Memorial Hospital of the University of Rochester certifies that to the best of his knowledge and belief, there are no parent companies or any publicly held company that has a 10% or greater ownership interest in Strong Memorial Hospital of the University of Rochester.

24. Tulane University, which is formally known as the Administrators of the Tulane Educational Fund, is a private, non-sectarian university consisting of 11 academic divisions and over 12,000 students. Tulane University is an educational non-profit corporation organized under the laws

of the State of Louisiana with its principal place of business in New Orleans, Louisiana. The undersigned counsel of record for the Administrators of the Tulane Educational Fund certifies that to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of the Administrators of the Tulane Educational Fund which have any outstanding securities in the hands of the public: None.

25. University Hospitals of Cleveland is a nonprofit corporation incorporated in the State of Ohio. Its activities include providing patient care, conducting scientific research, and providing medical education and training in its northeast Ohio community. The undersigned counsel of record for Defendant University Hospitals of Cleveland certifies that, to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of University Hospitals of Cleveland which have outstanding securities (issued on their behalf by the Counties of Cuyahoga and Geauga, Ohio) in the hands of the public:

University Hospitals Health System, Inc.
University Hospitals of Cleveland
University Hospitals Health System - Heather Hill, Inc.
University Hospitals Health System - Heather Hill Rehabilitation Hospital, Inc.
Geauga Hospital Association, Inc.
UHHSICSAHS- Cuyahoga, Inc. and CSAHSLJHHS - Canton, Inc.
Southwest General Health Center
UHHS Bedford Medical Center.